Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CHRISTIAN F. MUMME,
Petitioner, Pro Se,

v.

U.S. DEPARTMENT OF LABOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 1945, was House of Representative's Report Number 1287, of the 79th Congress, 1st Session, 5-6 (1945) (H. R. Rep. 1287) (APPENDIX G) the valid, judicially binding statement of Congressional intent regarding 28 USC 2880(a)—the discretionary function exception, and does it remain so? *Berkovitz v. US, Opinion of the Court*, 486 US; 108 S. Ct. 1959, 1960 (1988) (APPENDIX H).

2. Is case law, relative to 28 USC 2680(a)—the discretionary function exception (APPENDIX L), good, consistent, and settled law; or is it, in the words of one prominent First Circuit jurist, a "Serbodian bog"; begging for final judicial clarification and settlement? *Kelly v. US*, 924 F.2d 364 (1st Cir. 1991) (esp. Judge Brown's Concurrence) (APPENDIX E);'Maine Tort Law', Zillman, Gregory, Simmons, Chap. 15-06, p. 15-11., 1st and 3rd para., Butterworth Legal Publishers, 1995 (APPENDIX F) (for the proposition that 28 USC 2680(a) is "the most litigated of the exceptions", and the "application of the exception in individual cases remains unclear.").

3. If House of Representative's Report Number 1287, 79th Congress, 1st Session, 6 (1945) remains the valid, binding statement of Congressional intent regarding 28 USC 2880(a), have the lower Courts, in their respective rulings—and especially in Appellant's case, gone too far and violated Constitutionally mandated Separation Of Powers provisions—especially Article 1, Section 8 (APPENDIX C), legislating; by assuming powers reserved for Congress, by ignoring the distinction contained in H. R. Rep. 1287 between employees who are regulators and those who are not, by failing in their respective rulings to distinguish between the sole, distinct, Congressionally permitted claim against regulatory agencies—as opposed to the two, dis-

tinct, Congressionally permitted claims against nonregulatory agencies? (H. R. Rep. 1287 (APPENDIX G); Appellant's chart (APPENDIX M).

4. For purposes of distinction and clarification, and pursuant to the plain language of H. R. Rep. 1287—as it relates to 28 USC 2680(a), are the two, distinct, Congressionally permitted bases for claim—involving a nonregulatory agency, the performance or nonperformance of discretionary functions or duties (whether or not the discretion involved be abused) and the act or omission of Government employee exercising due care in the execution of a statute or regulation (whether or not valid); and for regulatory agencies, solely the abuse of discretionary authority (whether or not negligence is involved)? H. R. Rep. 1287 (APPENDIX G).

5. Are the United States Department Of Labor, Office Workers Compensation Program (US DOL OWCP), and the United States Department Of Labor, Office Inspector General (US DOL OIG) regulatory—or nonregulatory, agencies; within the meaning and intent of House of Representative's Report No. 1287, 79th Cong., 1st Sess., 5-6 (1945); as it pertains to 28 USC 2680(a)?

6. Are there material issues of fact remaining to be tried in Appellant's case; especially with regard to 28 USC 2680(a) and 28 USC 2680(h); as they relate to the challenged conduct of employees of US DOL OWCP and US DOL OIG? For instance, if the US DOL OWCP and US DOL OIG are judicially declared nonregulatory agencies, is the challenged employee conduct—in Appellant's case, for instance, either performance or failure to perform a discretionary function; or is it rather that agency employees negligently failed to properly supervise their employees, and—pursuant to 28 USC 2680(h) (APPENDIX L), purposely abused process, and deliberately and maliciously prosecuted Appellant; injuring the Appellant?

Wright v. US (1983 CA 9 Cal) 719 F.2d 1032 (APPENDIX K). If US DOL OWCP and US DOL OIG, on the other hand, are judicially declared regulatory agencies—such as the FTC or the SEC; that is, agencies which regulate the day-to-day activities of private—as opposed to non-private, individuals (*US v. VARIG Airlines*, 467 US 797, 813 (1984) (APPENDIX J), are all agency employees regulators, per H. R. Rep. 1287, 79th Cong., 1st Sess., 6 (1945), and is the challenged conduct abusively discretionary? If not, did agency personnel conduct themselves in ways not protected by 28USC 2680(a); injuring the Appellant, in that they failed to properly supervise their employees, deliberately abused process, and deliberately and maliciously prosecuted Appellant? *Wright v. US* (1983 CA 9 Cal) 719 F.2d 1032 (APPENDIX K).

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IN THE

Supreme Court of the United States

No. ___

CHRISTIAN F. MUMME,
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v.

U.S. DEPARTMENT OF LABOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals is unpublished and appears at Appendix A.

The opinion of the United States district court appears at Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Articles I-III; especially Art. 1, Section 8, of the US Constitution—Separation of Powers (APPENDIX I).

JURISDICTION

The date on which the United States Court of Appeals decided my case was 12/5/01.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On November 9, 1995, as a result of an unreliable, disgruntled neighbor informant's false, prior report that Appellant—a Federal Workers Compensation claimant, was engaged in activities not commensurate with his accepted, compensable injuries, two dispatched US government field investigative agents knowingly and falsely reported that they—over a two hour period on that date, had video surveilled Appellant working in his yard at various construction tasks. Using that very poor quality 11/9/95 video and those false investigative reports and testimony, the government unsuccessfully proceeded to prosecute Appellant for worker's compensation fraud; including failed Grand Jury action. The uncontroverted record evidence clearly shows, however, that those two federal agents video surveilled two men Appellant had working for him on that date; at that site and time; Appellant having submitted several uncontroverted, supporting, eye-witness affidavits to that effect, and to the effect that Appellant was not at that site during the 11/9/95 government video surveillance. Appellant also has in the record accepted, uncontroverted, objective medical findings supporting Appellant's claim that he cannot work.

Appellant subsequently sued employees of the US DOL OWCP and US DOL OIG in Federal District Court, at Bangor, ME, under the Federal Tort Claim Act, for failing to properly supervise their employees, abusing process, and maliciously prosecuting Appellant. Appellant lost; the District Court essentially dismissing the action based on what

Appellant believes was that Court's improper understanding and application of 28 USC 2680(a)—as it relates to Rule 12(b)(1) (APPENDIX D).

Appellant believes the lower Courts legislated, in that they failed to understand and apply principles enumerated in H. R. Rep. 1287, 79th Cong., 1st Sess., 6 (1945) (APPENDIX G); especially by failing to recognize and differentiate between nonregulatory and regulatory agency, between an employee as regulator and an employee as nonregulator, and especially between the sole, Congressionally permitted claim against regulatory agencies versus the two Congressionally permitted claims against nonregulatory agencies (H. R. Rep 1287)—as they relate to 28 USC 2680(a), and finally, by failing to recognize whether, in fact, any of these three permitted claims specifically matches employee conduct complained of by the Appellant in his case; for purposes of applying 28 USC 2680(a).

Appellant appealed to the First Circuit; again citing H. R. Rep. 1287, 79th Cong. 1st Sess., 5-6 (1945) (as it pertains to 28 USC 2680(a)); the First Circuit saying, in its very brief ruling, only that it had reviewed the District Court's ruling, and agreed with it (APPENDIX A). Appellant petitions.

REASONS FOR GRANTING THE PETITION

Appellant now petitions the Supreme Court for writ of certiorari, in order that it may—given this opportunity, be clearly and conclusively determined whether or not Courts—in their rulings pursuant to 28 USC 2680(a)—the discretionary function exception, are bound by Congressional intent; as that intent is expressed in H. R. Rep. 1287, 79th Cong., 1st Sess., 5-6 (1945); so that Courts must differentiate not only between employees who are regulators and employees who are not regulators, and between federal agencies which are regulatory, and those which are not, but must especially determine whether the basis for a Federal tort

claim against an agency employee is a Congressionally permitted basis, per H. R. Rep. 1287 79th Cong., 1st Sess., 5-6 (1945); for purposes of allowing 28 USC 2680(a) exemption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 01-1443

CHRISTIAN F. MUMME,
Plaintiff, Appellant,

v.

U. S. DEPARTMENT OF LABOR, *et al.*,
Defendants, Appellees.

No. 01-1444

GAIL R. MUMME,
Plaintiff, Appellant,

v.

U. S. DEPARTMENT OF LABOR, *et al.*,
Defendants, Appellees.

JUDGEMENT

Entered: December 5, 2001

We have reviewed the record in these cases, including the briefs of the parties. Essentially for the reasons given by the district court in its order "dismissing plaintiff's claims," dated January 29, 2001, and in its order "dismissing plaintiff's loss of consortium claims," of the same date, the judgement of the district court is *affirmed*.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/ Julie Gregg
Appeals Attorney

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Docket no. 00-CV-103-B
ENTERED ON DOCKET 1/29/01

CHRISTIAN MUMME,

Plaintiff,

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF LABOR, AND SECRETARY OF LABOR ALEXIS HERMAN,

Defendants.

ORDER DISMISSING PLAINTIFF'S CLAIMS

SINGAL, *District Judge.*

Before the Court is Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Docket #15). Also pending is Plaintiff's Motion to Vacate (Docket #24) an endorsement order whereby this Court granted Defendants a time extension to file a reply brief (Docket #23). Appearing pro se, Plaintiff has brought tort claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680, and a *Bivens* claim that the Government has violated his Fifth Amendments rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) [1]

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[1] In the Complaint, Plaintiff named the Department of Labor and Former Secretary of Labor Alexis Herman as defendants. In a motion to amend the Complaint, Plaintiff asked for permission to add the Treasury Department and former Secretary Lawrence Summers (Docket #6). The

Based on the following reasons, the Court DENIES Plaintiff's Motion to Vacate and GRANTS Defendants' Motion to Dismiss.

I. SUBJECT MATTER JURISDICTION

A. Standard of Review

When deciding whether to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), courts "ma consider whatever evidence has been submitted, such as the depositions and exhibits submitted. . . ." *Aversa v. United States*, 99 F.3d 1200, 1210 (1st Cir. 1996). The court then construes the complaint and any additional evidence "liberally, treating all well-pleaded facts

---

Court granted permission to amend, but Plaintiff never actually filed an amended complaint. Furthermore, in filings that Plaintiff has made subsequent to his motion to amend, he continues to list Herman and the Labor Department as the only defendants without mentioning Summers or the Treasury Department. Therefore, the Court sees no reason to include Summers or the Department of the Treasury as named defendants. The Government argues that it is improper for Plaintiff to name Herman, Summers or their respective agencies as defendants to claims brought under the Federal Tort Claims Act. Because the United states is the only party that may be sued under the Federal Tort Claims Act, the Court sua sponte adds the United States as a named defendant regarding Plaintiff's tort claims. *See* 28 U.S.C. § 2679; *United States v. Smith*, 499 U.S. 160 (1991). Regarding Plaintiff's tort claims, the United States is the only appropriate defendant. The Government argues that the Court should dismiss Plaintiff's other claim, that the Department of Labor and Secretary Herman violated his Fifth Amendment due process rights, because constitutional claims cannot be brought under the FTCA. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Indeed, Plaintiff cites the FTCA as the legal basis of his causes of action. The Court, however, reads Plaintiff's pro se pleadings liberally. *See, e.g., Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997). Therefore, the Court construes Plaintiff's constitutional claim as a "*Bivens*" claim. Thus, the Court approaches this case as: numerous tort claims against the United States, and a *Bivens* claim against the Department of Labor and Secretary Herman.

as true and indulging all reasonable inferences in favor of the plaintiff." *Id.* At 1209-1210.

This liberal standard is especially applicable in cases featuring a pro se plaintiff. *See Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997) "We are required to construe liberally a pro se complaint"). "A plaintiff, however, may not rest merely on unsupported conclusions or interpretations of law . . . . Subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts will not defeat a motion to dismiss." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995) (internal quotations omitted). Furthermore, a plaintiff bears the burden of establishing subject matter jurisdiction. *See Aversa*, 99 F.3d at 1209; *Murphy*, 45 F.3d at 552. Pursuant to this standard, the Court lays out the relevant facts of the case below.

B. Background

Plaintiff Christian Mumme was an inspector for the United States Department of Treasury Custom Service. His duties included standing on his feet for long hours, baggage and examining their contents. In 1986, Mumme suffered and employment-related back injury while stepping off the tailgate of a truck that he was inspecting. Over the next few years his back condition worsened and he ceased working in 1991. Since then, the Government has paid him total disability wage loss compensation and provided medical benefits for his back-related injury pursuant to the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq*. In 1993, the Government began paying for the treatment of a work-related emotional disorder that Mumme was suffering. Recently, he has been treated for his emotional condition by Dr. Sally Weiss, at the Government's expense. Presently, Mumme receives approximately $1,000 each week in disability pay under FECA, which is administered by the Department of Labor.

Allegedly tipped off by a disgruntled neighbor of Mumme, a joint team of officials from the Department of Labor Office of Inspector General ("OIG") and the Department of Labor Office Workers' Compensation Program ("OWCP") initiated an investigation of Mumme. In the autumn of 1995, investigators observed his residence and allegedly witnessed him performing a variety of tasks not commensurate with one who has been rendered disabled by a back condition. Specifically, investigators claim that they watched Mumme: hammer nails, dig ditches, put up fence posts, saw wood with a chainsaw and operate a tractor. Moreover, the Government's investigators allegedly watched Mumme carry heavy items, such as several bags of cement and a marine motor. Also, they allegedly saw Mumme regularly riding a motorcycle. As part of this investigation, the OIG and OWCP investigators conducted video surveillance of persons on Mumme's property during the morning of November 9, 1995.

In March of 1998, the Government required Mumme to undergo a physical examination by Dr. John Bradford, an orthopedic specialist. Prior to Mumme's appointment with the doctor, the OWCP sent Bradford certain materials regarding Mumme's physical condition. Among these materials, the Government transmitted to Bradford the OWCP's report on Mumme, a suggested list of medical findings and a videotape recorded by the Government agents during the morning of November 9, 1995. It is not clear to the Court what this videotape contains, but the Government implies that it shows Mumme performing construction work in his yard. Mumme, however, has submitted affidavits attesting that he was not at home that morning, so the tape can only show other individuals working in Mumme's yard.

Next, the OWCP demanded that Weiss, Mumme's psychiatrist, submit her written evaluations of Mumme to the Government. Mumme instructed Weiss not to submit the

medical records pertaining to him to the Government. OWCP responded by temporarily suspending its payment of Weiss' bill and revoking Mumme's travel authorization to see Weiss. Because Mumme refused to permit Weiss from conveying the medical evaluations to OWCP, the OIG attempted to subpoena them. It is not clear on the current record whether the Government was ultimately successful with it request for the documents.

Based on its investigation, the Government allegedly is contemplating prosecuting Mumme for criminal fraud. Because of the Government's actions against him, Mumme filed a complaint with the Department of Labor Office of the Solicitor. Subsequently, Mumme filed suit with this court *pro se*.[2]

C. Discussion

Plaintiff asserts a number of claims sounding in negligence and intentional tort as well as a claim that the Government violated his Fifth Amendment rights. The Court interprets Plaintiff's claims as: invasion of privacy, slander, libel, malicious prosecution, abuse of process, negligently prejudicing Dr. Bradford's medical opinion of Plaintiff, negligently investigation Plaintiff for criminal fraud, negligently pressuring Plaintiff and Dr. Weiss to submit medical evaluations to the Government, and a *Bivens* claim against the Department of Labor and Secretary Herman for threatening to deprive Plaintiff of his property rights in violation of the Fifth Amendment's Due Process Clause.

---

[2] Mumme has filed three suits against the Department of Labor. The Court dismissed Docket no. 00-CV-98-B for lack of subject matter jurisdiction on October 27, 2000. Still pending is Docket no. 00-CV-96-B, by which Mumme claims that the Government hs violated the Privacy Act, 5 U.S.C. § 552a. Also, Mumme's wife, Gail Mumme, has filed suit for loss of consortium, Docket no. 00-CV-104-B, based on the same factual circumstances as the instant case.

The United States argues that all of Plaintiff's tort claims fail for lack of subject matter jurisdiction. The general rule is that the doctrine of sovereign immunity bars tort claims against the United States. The United States, however, has waived sovereign immunity for many tort claims, as specified in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680. The FTCA features several exceptions, whereby the United States reserves its sovereign immunity against tort liability.

The Government argues that all of Plaintiff's claims fall within the exception protecting the Government from liability for discretionary functions. *See* 28 U.S.C. § 2680(a). The purpose of the discretionary function exception is to permit government employees to carry out their jobs without having to constantly second guess themselves in fear of facing lawsuits. *See, e.g., United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-14 (1984). To determine whether a government agent's actions fall within the discretionary function exception, a court must determine (1) whether the conduct itself is discretionary and (2) whether the conduct is justified by legitimate governmental policy. *See Shansky v. United States*, 164 F.3d 688, 691 (1st Cir. 1999); *Irving v. United States*, 162 F.3d 154, 163 (1st Cir. 1998).

Regarding the first question, a government agent's job duty is discretionary if it requires her to make independent decisions. *See, e.g., Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Also, a function is not discretionary if a federal statute, regulation or policy "specifically prescribes a course of action for an employee to follow." *Irving*, 162 F.3d at 163 (quoting *Berkovitz*, 486 U.S. at 536I). The conduct that serves as the basis for Plaintiff's tort claims is the Department of Labor's alleged investigation of his entitlement to disability compensation and medical benefits. FECA, however,

expressly grants the Department of Labor with the authority and the obligation to investigate claims:

> The Secretary of Labor shall determine and make a finding of facts and make an award for or against payment of compensation under this subchapter after—
>
> . . .
>
> (2) completing such investigation as he considers necessary.

5 U.S.C. § 8124(a)(2). The phrase "as he considers necessary" demonstrates that the Secretary of Labor is authorized to rely on her judgment to make decisions regarding how to conduct an investigation. Section 8128 of FECA specifically authorizes the Secretary of Labor to review grants of benefits, and to increase or decrease such benefits. As well, the Secretary of Labor is expected to delegate investigative responsibilities to subordinates within the Department of Labor. Furthermore, the Inspector General Act, 5 U.S.C. App. 3, grants inspectors general broad investigative powers. *See* 5 U.S.C. App. 3 § 2; *see, e.g., Winters Ranch P'ship v. Viadero*, 123 F.3d 327, 33i0 (5th Cir. 1997). It is an immanent right and duty of the Department of Labor and its OIG to investigate those persons receiving disability benefits to ensure that they are not defrauding the public.

Moreover, even indulging all reasonable inferences in Plaintiff's favor, the Government's conduct has not violated any statutes, regulations or policies. Plaintiff does not raise any—and the Court does not perceive any—statute, regulation or policy specifically prohibiting (1) the Government from transmitting information to a doctor for an impending physical exam or (2) videotaping people in their yards. Furthermore, the Department of Labor was authorized by statute to require Plaintiff to undergo a physical examination by Dr. Bradford, *See* 5 U.S.C. § 8123. FECA authorizes the Department of Labor to issue subpoenas to acquire evidence,

such as Plaintiff's medical records. *See* 5 U.S.C. § 8126. Moreover, these statutes necessarily demand that Government agents use judgment to make decisions. Therefore, the Court finds that these actions were discretionary.

Turning to the second facet of the discretionary function analysis, the Court must determine whether "some plausible policy justification could have undergirded the challenged conduct." *Shansky*, 164 F.3d at 692. The courts have not specified what constitutes legitimate policy bases for discretionary acts, instead leaving it to a "case-by-case development . . . ." *See id.* at 693. Although "the law presumes that the exercise of official discretion implicates policy judgements," the connection between the governmental duct and the policy justification cannot be grossly attenuated. *See id.* At 692-93. In the present case, the Government's conduct was firmly rooted in sound public policy. *See Shansky*, 164 F.3d at 692; *Irving*, 162 F.3d at 163. The United Sstates' investigation against Plaintiff "served two separate public policies: regulating FECA claims and preventing criminal fraud against the Government." *See Ward v. United States*, 738 F. Supp. 129, 133 (D. Del. 1990) (holding that it was a discretionary function of the United States Postal Service to investigate plaintiff who was suspected of dishonestly receiving FECA disability benefits for a debilitating back injury). Therefore, the Court finds that the United States' investigation was justified by legitimate public policy.

Indeed, many courts have held that governmental investigations conducted in the furtherance of public policy considerations fall within the discretionary function exception. *See, e.g., Sabow v. United States*, 93 F.3d 1445, 1456 (9th Cir. 1996) (holding that investigation of the death of a Marine pilot was protected by the discretionary function exception, even though government agents acted with "poor judgment and a general disregard for sound investigative procedure"); *Pooler v. United States*, 787 F.2d 868, 871 (3rd

Cir. 1986 ("Congress did not intend to provide for judicial review of the quality of investigative efforts."); *see also K.W. Thompson Tool Co. V. United States*, 836 F.2d 721, 728-29 (1st Cir. 1988) (federal agency protected from liability by discretionary function exception for prosecuting defendants who allegedly violated federal law and regulations). Because the United States' actions were discretionary and justified by legitimate policy considerations, the Court finds that all of Plaintiff's tort claims against the United States fall within the discretionary function exception of the FTC and are barred by sovereign immunity.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Because the Court lacks subject matter jurisdiction over Plaintiff's tort claims against the United States the only remaining matter is Plaintiff's allegation that the Department of Labor and former Secretary Herman have deprived him of his Fifth Amendment rights.

A. Standard of Review

Because both parties have submitted materials outside the pleadings, and because Plaintiff has had an opportunity to respond to Defendants' relevant factual allegations, the Court opts to treat Defendants' Motion under Rule 12(b)(6) as a summary judgement motion. *See* Fed. R. Civ. P. 12(b); *Whiting v. Maiolini*, 921 F.2d 5, 6 (1st Cir. 1990) (district courts have discretion to convert 12(b)(6) motions to Rule 56 motions without prior notice to parties if nonmovant has had opportunity to respond to movant's affidavits and factual allegations).

The Court grants a motion for summary judgement "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts "in the light most amicable to the party contesting summary judgment, indulging all reasonable inferences in that party's favor." *Pagano v. Frank*, 983 F.2d 343, 347 (1st Cir. 1993). When considering Defendants' arguments that Plaintiff has failed to state a claim upon which relief can be based, the Court views the factual record—outlined above—pursuant to this summary judgment standard.

B. Discussion

Plaintiff argues that by investigating him and communicating with Dr. Bradford, Defendants were "threatening the los[s] of plaintiff's property entitlements, and violating plaintiff's 5th Amendment rights; injuring the plaintiff as a result." (Pl. Compl. ¶ 2 (Docket #1).) The Court assumes that Plaintiff means by this that the Government has threatened to cancel his disability compensation payments and medical benefits, which comprise property to which he is entitled. The Court construes this allegation as a claim for violation of his due process right against the taking of property, potentially actionable under the *Bivens* doctrine. *See Bivens v Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing cause of action enabling plaintiff to seek judicial relief against federal officers who allegedly violated his Fourth Amendment rights).

First, a plaintiff cannot maintain a *Bivens* action against a federal agency. *See e.g.*, *Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000). Therefore, Plaintiff has no cause of action against the Department of Labor. Second, the *Bivens* doctrine permits plaintiffs to see legal redress against federal employees in their individual capacities, but not federal employees acting in their official capacities. *See id.* "Even then, the plaintiff must state a claim for direct rather than vicarious liability; respondeat superior is not a viable theory for *Bivens* liability."

Id. In the present case, Plaintiff has not brought suit against the specific agents who allegedly violated his rights. Instead, he has filed suit against the former Secretary of Labor. Even reading the record in a light most favorable to Plaintiff, Secretary Herman never took a direct hand in the Government's efforts against Plaintiff. Therefore, Plaintiff has no *Bivens* claim against Herman. *See id.* At 28-29.

Moreover, even if Plaintiff had named the specific agents of the OIG and OWCP who allegedly impinged on his due process rights, he would have no cause of action against them. Plaintiff is correct that benefits paid to one pursuant to the FECA can imbue the recipient with property rights. *See, e.g., Stuto v. Fleishman*, 164 F.3d 820, 825 (2nd Cir. 1999). The factual record before the Court indicates that Plaintiff continues to receive disability compensation and medical coverage, but that Plaintiff is worried that based on its investigation, the Department of Labor may suspend those benefits. Regarding an individual's proprty interest in her FECA benefits, however, the mere threat that the Department of Labor may withdraw benefits does not amount to a justiciable claim. *See id.* According to Stuto, because a FECA recipient can appeal a reduction in benefits with the Department of Labor subsequent to any reduction, the recipient has not been deprived of due process, and therefore he has no *Bivens* claim against any government employees. *See id.* (citing *Hudson v. Palmer*, 468 U.S. 517 (1984)I); *see also, e.g.*, 5 U.S.C. § 8124(b)(1) (authorizing FECA recipients to file an appeal with the Department of Labor within 30 days of a change in benefits). Because the Government has not altered his FECA benefits, and because Plaintiff would have an administrative route to appeal any such alteration, he has not been deprived of his due process rights. Therefore, the Court finds that Plaintiff cannot state a claim that his Fifth Amendment rights have been violated.

III. PLAINTIFF'S MOTION TO VACATE

As a final note, Plaintiff objects to and moves to vacate the Court's order extending the time limit for Defendants to file a reply brief. First, it was only fair to extend Defendants' time to file a reply brief because the Court previously had extended the deadline for Plaintiff to file a response brief. (*See* Order Granting Pl. Mot. To Extend Time, Nov. 29, 2000 (Docket #17).) Second, Defendant needed a time extension because Plaintiff filed a thirty-page brief, even though Local Rule 7(e) establishes a limit of twenty pages without prior leave of Court. Third, because the Court herein has decided the issue of Defendants' Motion to Dismiss, the Motion to Vacate is moot.

IV. CONCLUSION

For the reasons discussed above, the Court hereby GRANTS Defendants' Motion to Dismiss. Pursuant to this ruling, the Court dismisses with prejudice Plaintiff's tort claims and grants summary judgment for Defendant on Plaintiff's civil rights claim. The Court also DENIES Plaintiff's Motion to Vacate the endorsement order extending Defendants' time to file a reply brief.

SO ORDERED.

/s/ GEORGE Z. SIGAL
United States District Judge

Dated this 29th day of January, 2001.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Docket no. 00-CV-104-B
ENTERED ON DOCKET 1/29/01

GAIL MUMME,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER DISMISSING PLAINTIFF'S
LOSS OF CONSORTIUM CLAIMS

SINGAL, *District Judge.*

Before the Court is Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Docket #9). Also pending is Plaintiff's Motion to Vacate (Docket #14) an endorsement order whereby this Court granted Defendant a time extension to file a reply brief (Docket #13). Appearing pro se, Plaintiff has brought claims for loss of consortium and loss of enjoyment of life based on the tort claims of her husband, Christian Mumme, against the United States under the Federal Tort Claims Act, 18 U.S.C. §§ 1346(b), 2671–2680. (*See* Docket no. 00-CV-103-B-S.)

Today, this Court has issued an Order dismissing her husband's tort claims against the Government because the United States acted within the discretionary function immunity of the Federal Tort Claims Act, 28 § 2680(a). (*See* ORDER Dismissing Plaintiff's Claims, Jan. 22, 2001 (Docket No. 00-CV-103-B-S).) Plaintiff's claims for loss of consortium and loss of enjoyment of life rely on the success of her husband's tort claims. *See, e.g., Berniger v. Meadow Green-*

Wildcat Corp., 945 F.2d 4, 9 n.4 (1st Cir. 1991). Because the Court dismisses her husband's tort claims for lack of subject matter jurisdiction, the Court must also dismiss Plaintiff's claims. *See Stewart v. United States*, 486 F. Supp. 178, 185 (C.D. Ill. 1980) (dismissing loss of consortium claim against United States because Government's actions were discretionary functions).

Also, Plaintiff objects to and moves to vacate the Court's order extending the time limit for Defendants to file a reply brief. First, it was only fair to extend Defendants' time to file a reply brief because the Court previously had extended the deadline for Plaintiff to file a response brief. (*See* Order Nov. 29, 2000 (Docket #11).) Second, even though the Court permitted Defendants to file a reply brief late, they never did so. Third, because the Court herein has decided the issue of Defendants' Motion to Dismiss, the Motion to Vacate is moot.

Therefore, the Court hereby GRANTS Defendants' Motion to Dismiss. The Court dismisses Plaintiff's claims with prejudice. The Court DENIES Plaintiff's Motion to Vacate the endorsement order extending Defendants' time to file a response brief.

SO ORDERED.

/s/ GEORGE Z. SINGAL
United States District Judge

Dated this 29th day of January, 2001.

APPENDIX C

28 USC Sec. 2680

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART IV—PARTICULAR PROCEEDINGS
CHAPTER 171—TORT CLAIMS PROCEDURE

Sec. 2680

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

APPENDIX D

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED BY PLEADING OR MOTION—MOTION FOR JUDGEMENT OF PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter,

APPENDIX E

JUDGE BROWN'S CONCURRENCE

JOHN R. BROWN, *Senior Circuit Judge*, Concurring.

I concur but solely on the ground of flagrant deficiencies by Kelly in the summary judgment proceedings.

As the Court's opinion reflects, Kelly wholly failed, as required by local Rule 18, to file an opposition statement or controverting factual affidavits. Thus the government's statement and supporting facts were uncontradicted. More than ignoring a local rule, this non-action flies directly in the face of *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265, 275 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505. 2510, 91 L. Ed. 2d 202, 211 (1986), and this Court's *Garside v. Osco Drug. Inc.*, 895 F.2d 46, 48 (1st Cir. 1990).

But under Manual § 8121(A)(1), knowledge, by the local Bureau Chief (or his deputy), or at least some awareness of some gossip, rumor, or information that Kelly was involved in the leak, was indispensable to trigger the obligation to report to OIS.

Having completely failed even to remotely challenge that fact, that should be, as it was, really the end of the case.

But the Court does not stop there. Indeed, with all the earmarks of deliberative certainty the Court enters the slippery field of discretionary function. If we had an outline of definitively authoritative principles this effort to rule categorically might be acceptable.

But one thing is sure: the Supreme Court, with all due respect, by its undulations from Dalehite to Indian Towing and Rayonier to Varig Airlines to Berkowitz provides anything but a predictable certitude on what is, or is not, within a discretionary function. In this Serbodian bog we ought not to guess whether "will" means "must" or something less; or

whether the lower ranking subordinate employee is the one to exercise the high level governmental judgment to declare the instruction discretionary beyond judicial scrutiny.

There is time in which to decide such issue after full briefing and argument on a record which under Article III really raises the issues.

Hence, my limited concurrence.

APPENDIX F

MAINE TORT LAW Issue 0 (1994)

§ 15.06—The Discretionary Function Exception

The final exception appears as section 2680(a). It is by far the most litigated of the exceptions and the most important in setting the scope of the FTCA. It excepts governmental liability for: "[a]ny claim based uon an act or omission of an employee of the Government, exercising due care. In the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The first portion of the section (due care in the execution of a law) has been rarely litigated. Most probably, the requirement that the governmental employee be "exercising due care" discourages suit under a statute requiring a showing of a "negligent or wrongful act."

The second portion of the section (the "discretionary function" exception) has given rise to four significant Supreme Court opinions and hundreds of lower court opinions. Even after this vast judicial dissection, the application of the exception in individual cases remains unclear.

APPENDIX G

"79th Congress 1st Session House Report 1287"

TITLE IV—PROVISIONS COMMON TO TITLES II AND III

Section 401 prescribes a limitation period of 1 year. If the claim is presented to the agency involved, an additional period of 6 months provided from the time of disposition by the agency or withdrawal of the claim, within which the file suit.

Section 402 specifies the claims which would not be covered by the bill.

The first subsection of section 402 exempts from the bill claims based uon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted.

The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402 (5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions.

The other exemptions in section 402 relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers; admiralty and maritime torts, deliberate torts such as assault and battery; and others.

APPENDIX H

BERKOVITZ BY *BERKOVITZ v. U.S.*
Cite as 108 S.Ct. 1954 (1988)

Moreover, assuming the challenged conduct involves an element of judgement, a court must determine whether that judgement is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United Stats v. Varig Airliners, supra*, at 814, 104 S.Ct., at 2764-2765. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States, supra*, at 36, 73 S.Ct., at 968 ("Where there is room for policy judgement and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgement.

This Court's decision in *Varig Airlines* illustrates these propositions. The two cases resolved in that decision were tort suits by the victims of airplane accidents who alleged that the Federal Aviation Administration (FAA) had acted negligently in certifying certain airplanes for operation. The Court characterized the suits as challenging the FAA's decision to certify the airplanes without first inspecting them and held that this decision was a discretionary act for which the Government was immun from liability. In reaching this result, the Court carefully reviewed the statutory and regulatory scheme governing the inspection and certification of airplanes. Congress had given the Secretary of Transportation broad authority to establish and implement a program for enforcing compliance with airplane safety standards. In the exercise of that authority, the FAA, as the Secretary's

designee, had devised a system of "spot-checking" airplanes for compliance. This Court first held that the establishment of that system was a discretionary function within the meaning of the FTCA because it represented a policy determination as to how best to "accommodat[e] the goal of air transportation safety and the reality of finite agency resources." 467 U.S., at 820, 104 S.CT., at 2767-2768. The Court then stated that the discretionary function exception also protected "the acts of FAA employees in executing the 'spot-check' program" because under this program the employees "were specifically empowered to make policy judgements regarding the degree of confidence that might reasonably be placed in a given manufacture, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Ibid.* Thus, the Court held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations.[1]

In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument, pressed both in this Court and the Court of appeals, that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies. That argument is rebutted first by the language of the exception, which protects "discretionary" functions, rather than "regulatory" functions. The significance of Congress'

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[1] The decision in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), also illuminates the appropriate scope of the discretionary function exception The plaintiff in that case sued the Government for failing to maintain a lighthouse in good working order, The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgement. See *id.*, at 69, 76 S.Ct., at 126-127. The Court held, however that the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA. See *ibid.* The latter course of conduct did not involve any permissible exercise of policy judgement,

choice of language is supported by the legislative history. As this Court previously has indicated the relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature.[2]

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[2] The House of Representative Report on the final version of the FTCA discussed the application of the discretionary function exception to the activities of regulatory agencies by stating that it would preclude application of the Act to "a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. . . . The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies." H.R. Reg. No. 1287, 79th Cong., 1st Sess., 6 (1945). This passage illustrates that Congress intended the discretionary function exception to apply to the *discretionary* acts of regulators, rather that to all regulatory acts.

APPENDIX I

CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, Insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * * *

APPENDIX J

US v VARIG Airlines, 267 US 797, 813 (1984)

As in Dalehite, it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception. From the legislative and judicial materials, however it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a)., First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in Dalehite, the exception covers "[not] only agencies of government . . . but all employees exercising discretion." 346 U.S., at 33. Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.

Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role a a regulator of the conduct of private individuals.[1] Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name. *See supra*, at 808-810. This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial

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[1] Even the dissenters in Dalehite read the legislative history of the discretionary function exception as protecting "that type of discretion which government agencies exercise in regulating private individuals." *Dalehite v. United States*, 346 U. S., at 58, n. 12 (Jackson, J., joined by Black and Frankfurter, JJ., dissenting).

"second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163 (1963).

APPENDIX K

Wright v. US (1983 CA 9 Cal) 719 F.2d 1032

Discretionary Function

The United States cannot be held liable for any claim which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused. "28 U.S.C. § 2680(a). The discretionary function exemption was intended to preclude tort claims arising from decisions by executives or administrators when such decisions require policy choices. *Dalehite v. United States*, 346 U.S. 15, 35-36, 97 L. Ed. 1427, 73 S. Ct. 956 (1953); *S.A. Empresis De Viacao Aerea Rio Grandense v. United States*, 692 F.2d 1205, 1208-09 (9th Cir. 1982), *cert. granted*, 461 U.S. 925, 103 S. Ct. 2084, 77 L. Ed. 2d 296 (1983). We have therefore limited the exception to decisions made at a planning rather than an operational level even though decisions at the latter level may involve an element of discretion Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975).

The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability. *See Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), *cert. denied*, 389 U. S. 841, 19 L. Ed. 2d 106, 88 S. Ct. 76 (1967). The conduct of agent Fletcher in implementing that decision, however, including the nature of his testimony before the grand jury, is not immune as a discretionary function. *See Liuzzo v. United States*, 508 F. Supp. 923, 930-33 (E.D. Mich. 1981) (claims concerning FBI agents implementation of governments' informant policy not barred by discretionary function exception). Unlike the decision to prosecute, and agent's conduct, both before and

after that decision is made, is susceptible to judicial evaluation. *See Driscoll v. United States*, 525 F.2d at 138. Assessment or collection of Any Tax.

The United States is immune from liability for "any claim arising in respect of the assessment or collection of any tax. . . ." 28 U.S.C. § 2680 (c). The Government argues that agent Fletcher's participation in the criminal prosecution of Wright falls within the scope of this exception.

In the literal sense, of course, Agent Fletcher's role in the prosecution of plaintiff did not arise "in respect of the assessment or collection of any tax" owed by plaintiff. The prosecution was an attempt to impose criminal penalties on Wright, not to collect taxes from him. On the other hand, the exception has been broadly construed. In *Morris v. United States*, 521 F.2d 872 (9th Cir. 1975), we applied subsection 2680(c) to bar a claim by a taxpayer that IRS agents told his creditors of his purported tax liability and harassed and intimidated him during the course of their investigation. *See also Capozzoli v. Tracey*, 663 F.2d 654, 658 (5th Cir. 1981) (language of § 2680(c) "is broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties"). It would therefore not strain precedent to hold that Agent Fletcher's role in prosecuting Wright fell within the exception because the prosecution might serve as a deterrent that will facilitate the "assessment or collection" of taxes generally. WE are disinclined to interpret the exception so generously, however, in the face of Congress's action in passing the 1974 "malicious prosecution" amendment to the FTCA.

In providing that malicious prosecution claims may be brought under the FTCA when they are based on acts of "investigative or law enforcement officers," 28 U.S.C. § 2680(h), Congress appears to have authorized the kind of claim Wright has asserted here. While the legislative history

is not very illuminating,[1] neither it nor the language of the proviso suggests that malicious tax prosecutions are to be treated differently from other malicious prosecutions. We need not hold, however, that the 1974 amendments partially repealed § 2680(c). Our duty in construing the tax collection and assessment exception of § 2680(h) and the later law enforcement proviso of § 2680(c) is to reconcile them and give meaning to both if we are able. This goal can be accomplished by construing the tax assessment and collection exception not to apply to Agent Fletcher's actions in carrying

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[1] Rep. Holifield introduced H.R. 8245, see 119 Cong. Rec. 17, 392 (1973), which was designed to modify the operations of the Drug Enforcement Administration and the Immigration and Naturalization Service. The bill was favorably reported on in committee, see H.R. Rep. No. 303, 93rd Cong., 1st Sess. 1973), and on July 17, 1973, was unanimously passed by the House, 119 Cong. Rec. 24, 184 (1973).

The Senate Committee that considered H.R. 8245 added the section amending the FTCA. S. Rep. No. 588, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 2789, 2790-91. The amendment was motivated by several incidents in which federal narcotics agents engaged in illegal "no-knock" raids. *Id.* The brief Senate Report is mainly devoted to the problem of illegal searches and seizures, but adds "the Committee's amendment should not be viewed as limited to constitutional tort situations but would apply to any case in which a federal law enforcement agent committed the tort while acting within the scope of his employment or under color of federal law." *Id.*

Without any floor debate, the Senate unanimously passed H.R. 8245 as amended. 119 Cong. Rec. 38, 968-69m 38-185 (1973). The House reconsidered the bill with the Senate amendment and passed the bill. 120 Cong. Rec. 5,290 (1974). Some members thought the amendment's potential effect on the exclusionary rule or the public treasury was too important to be voted on without consideration by a House committee. *See, e.g., id.* At 5,287 (remarks of Rep. Butler); *id.* at 5,289 (remarks of Rep. Dennis). The substance of the amendment was portrayed as concerned primarily with the search and seizure issue with no discussion of the effect of the amendment on the whole of the FTCA. *See, e.g., id.* at 5,286-87 (remarks of Rep. Wiggins) ("The specific problem envisioned by the proponents of the amendment were fourth amendment violations where a police officer may improperly enter the premises of a suspect").

out the criminal prosecution against plaintiff, insofar as those acts are alleged to constitute malicious prosecution. We so construe § 2680(c). Our construction does violence to neither section and leaves each with a great deal of room to operate. It reads no exemptions into the FTCA beyond those provided. *See United States v. Muniz*, 374 U.S. at 166 (quoting Rayonier, Inc v. United States, 352 U.S. 315, 320, 1 L. Ed. 2d 354, 77 S. Ct. 374 (1957).

Conclusion

The district court correctly concluded that it laced jurisdiction over the individual defendants. The United States is immune from liability for malicious prosecution stemming from the acts of all its agents except agent Fletcher who is a law enforcement officer. Neither the "discretionary function" exception nor the "assessment and collection of any tax" exception shields the United States from liability as a result of the actions of agent Fletcher. We therefore affirm in part, reverse in part and remand to the district court.

APPENDIX L

28 USC 2680(h)

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrest for violations of Federal law.

APPENDIX M

Flow Chart: Federal Tort Claim Act (FTCA)—apparent parameters for application of 28 U.S.C. § 2680(a); per plain language of H. R. Rep. 1287, 79th Cong., 1st Sess., 5-6 (1945) (H.R. Rep. 1287).

Nonregulatory Agency? Yes? No?	Regulatory Agency? Yes?
Per H.R. Rep. 1287, do either or both of the two, Congressionally permitted claims of *performance/nonperformance of discretionary function or duty (whether or not discretion abused), or that based on the act or omission of Government employees exercising due care in the execution of statute or regulations (whether or not valid)* exist? If yes,	Per H.R. Rep. 1287, does the sole, Congressionally permitted claim of abuse of *discretionary authority (whether or not negligence involved)* exist? If yes,
No cause of action exists, per FTCA; 28 U.S.C. § 2680(a) applies.	No cause of action exists, per FTCA, 28 U.S.C. § 2680(a) applies.
Otherwise, for other claims, cause of action may exist, per FTCA; 28 U.S.C. § 2680(a) does *not* apply.	Otherwise, for other claims, cause of action may exist, per FTCA; 28 U.S.C. § 2680(a) does *not* apply.